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IN THE

Supreme Court of the United States

October Term, 1950

No. 85

LOCAL 74, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, A. F. of L., and JACK HENDERSON, Individually and as Agent for Local 74, United Brotherhood of Carpenters and Joiners of America, A. F. of L.,
Petitioners,

against

NATIONAL LABOR RELATIONS BOARD,
Respondent.

BRIEF OF LOCAL 74 AND JACK HENDERSON, PETITIONERS

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against

NATIONAL LABOR RELATIONS BOARD,
Respondent.

BRIEF OF LOCAL 74 AND JACK HENDERSON, PETITIONERS

Preliminary Statement

On December 11, 1950 this Court granted a writ of certiorari to review the decree of the United States Court of Appeals for the Sixth Circuit, filed April 4, 1950, adjudging that the order of the National Labor Relations Board be enforced as prayed for in the petition (R. 197). See 340 U. S. 902.

The unanimous opinion of the United States Court of Appeals (per Martin, C. J.) appears at pages 186-196 of the Record and is officially reported in 181 F. 2d 126.

Jurisdiction

The jurisdiction of this Court is invoked under Title 28, Section 1254 of the United States Code.

The Statutes Involved

The statute involved is Section 8(b)(4)(A) of the Labor-Management Act, 1947. This section is quoted at pages 8, 9, *post*. Other sections of that Act are quoted at pages 26-28, *post*.

The Constitutional Amendments involved are the First, Fifth, Tenth and Thirteenth.

The Questions of Law Involved

In its Supplemental Memorandum withdrawing its opposition to the granting of a writ of certiorari in the present case, the National Labor Relations Board said (p. 1):

> "The Petition for a Writ of Certiorari in this case, like the petition in No. 108, this Term, poses the question whether the action of a union in calling a strike of its members employed on a construction job, because the owner thereof engaged the services of a subcontractor who employed non-union labor on the project, violates Section 8 (b) (4) (A) of the Act."

Without binding or confining ourselves to this selection and phrasing of matters of law underlying this case, we state as follows our conception of the fundamental questions of law involved:

I

Stanley, at whose private residence the union men were at work, conceded that he had made a cost-plus union contract for the construction work therein with B. F. Parker (an independent union contractor and himself a member of the petitioner, Local 74), and that he (Stanley) had stipulated for union men to do the work (R. 96):

> "I wanted Union men and had always enjoyed having Union men working, preferred them because I thought their work was better, and that Parker—*it was my understanding with Parker that Union men were going to do the work.*" (Italics ours.)

He also conceded that the union men were doing the work satisfactorily (R. 103), and that, while the work was in progress, he made a unit contract with Watson's Specialty Store whereby the non-union employees of that store would replace the union men in installing floor and wall coverings purchased by Stanley at Watson's, nowithstanding that he was warned by Parker that, as a consequence, the union men would quit the job (R. 140-1).

1. Does Section 8(b)(4)(A) of the Labor-Management Relations Act, 1947, make it an unfair labor practice for the union thereupon to withdraw its members from the Stanley job?

2. If so, would the Section be constitutional?

II

The Board's Main Brief, filed in support of its former opposition to the petition for certiorari, made the following concession of fact concerning the action of the petitioner Henderson, the business agent of the petitioner Local 74, in ordering withdrawal from the Stanley job on August 21, 1947 (p. 8):

> "Henderson gave the order in accordance with a long standing rule of Local 74 not to permit its members to work on a job where non-union workers are employed. He testified that since Watson's non-union employees were working on the Stanley residence, it would have been a violation of the rules of Local 74 for the carpenters to have returned to that job on August 22 or thereafter. (R. 21, 136-138.)"

In view of this factual concession, there arise the following questions of law of general importance to organized labor and to industry and in the administration of the Act:

1. Does the Act purport to invalidate and annul the "long standing rule" and practice of this and other unions that members will not continue to work on a union job into which, after their employment, non-union workers have been injected,—particularly where such non-union men have been injected to take over portions of the work for which the union men had been employed and which they were performing?

2. If the Act does so purport, is it constitutional?

III

The Board's Main Brief also contained the following further concessions of fact as to what occurred *"while the work was in progress"* (pp. 6, 7):

> "Watson insisted that its own employees who were non-union, *must install any coverings it sold.* * * * Parker and Stanley discussed the complications that might arise with the union employees employed at the Stanley residence if Watson's non-union workmen installed the coverings. * * * Thereupon Stanley made a special contract with Watson for *the purchase and installation* of the floor and wall coverings." (Italics ours.)

1. Since Watson had with purpose, and Stanley had by contract, created this act of aggression against the union employment which Stanley had himself established, how could the union or its members be expected—much less required—to continue with or return to the work in the face of this deliberate subversion of their working conditions?

2. How, under the conceded circumstances and under the Act and the Federal Constitution, could the freedom of the union and its members be nullified by this provocative contract?

IV

Moreover, Section 8(b)(4)(A) was not in effect when the Union and the union men withdrew from the Stanley job on August 21, 1947, immediately following Stanley's injection of non-union men into their employment.

In consequence, the petitioners were not guilty of an unfair labor practice on August 22 when the Section took effect, in not thereupon rescinding the withdrawal and thus requiring the union men to return to the different, non-union and less advantageous employment and working conditions which Stanley had created several days before.

V

Should Section 8(b(4)(A) be so interpreted and applied as to have required the Petitioners on August 22nd to "rescind" the so-called "Order" of August 21st and thus require the union men to return to the lesser employment under non-union conditions substituted by Stanley, such an interpretation and application of the Section would violate the First, Fifth, Tenth and Thirteenth Amendments to the Constitution of the United States.

VI

The Court below erred in holding that the Board had jurisdiction.

The brief construction job in Stanley's private residence was so essentially local, separate and transitory as not to fall within the interstate commerce clause, and hence not within the Labor-Management Relations Act, 1947.

VII

In any event, on August 22, 1947, and thereafter, there was, as a matter of law, (1) no justification for "A Cease and Desist Order"; and (2) no justification for not applying the *de minimis* principle.

The Proceeding

The Charges

The Petitioners were charged by the General Counsel's complaint with unfair labor practices affecting commerce within the meaning of Section 8(b), subsections (1) (A) and (4) (A), and Section 2, subsections (6) and (7) of the Labor-Management Relations Act, 1947, herein called "the Act" (R. 158-162).

The Petitioners filed an "Answer and Motion" wherein they denied the charge and moved to dismiss the complaint (R. 163).

The grounds of the Motion to dismiss were enumerated in the Answer and in Exhibit B thereto annexed (R. 165), which Exhibit was the Answer and Motion of the Petitioners to an application simultaneously filed by the General Counsel in the District Court of the United States for the Southern Division, Eastern District of Tennessee, asking for a preliminary injunction pursuant to Section 10(1) of the Act (R. 165-172, 172-177).

Included in those grounds were these Petitioners' constitutional claims under the First, Fifth, Tenth and Thirteenth Amendments (R. 33, 43, 44, 45, 171).

The Decision by Judge Darr

The Board's petition under Section 10(1) of the Act was denied by United States District Judge Darr with an extended opinion reported in *Styles* v. *Local 74 et al.*, 74 F. Supp. 499 (Oct. 28, 1947).

Judge Darr's opinion concluded as follows (p. 502):

> "In any event, my judgment is that the factual situation upon which the application is based sets up lawful conduct and therefore there can be no inference that this would indicate a future action of unlawful conduct.

Being of the opinion as herein set out, I have concluded that this is not a case under the Act and that I should not direct the issuance of an injunction pending the action of the Board."

The General Counsel took no appeal from this denial.

The Examiner's Report

The Trial Examiner's Report, dated December 29, 1947, held that there had been a violation by Petitioners of Section 8(b)(4)(A), but not of Section 8(b)(1)(A) or of any other provision of the Act; and that, as an administrative officer, he could not pass upon the constitutional issues (R. 11, 32).

His chief recommendation was that the Petitioners (R. 35):

> "1. Cease and desist from engaging in or inducing the members of Local 74 to engage in a strike or a concerted refusal in the course of their employment to perform services for any employer, where an object thereof is to require any employer, or other person to cease doing business with Ira A. Watson Company, doing business as Watson's Specialty Store, or other person."

The Petitioners filed full exceptions (R. 38), including exceptions on the constitutional grounds (R. 43, 44, 45).

The Board's Decision

In its order of November 22, 1948 (80 N. L. R. B. 533) the Board confirmed these recommendations and adopted the Examiner's findings and conclusions with certain "additions and modifications" (R. 51).

Among such modifications were the following (R. 55, footnote 10):

> "The Trial Examiner erroneously stated that the Respondents (Petitioners herein) did not dispute that

the strike order in question would have been illegal if issued after August 22, 1947."

Also (R. 54, footnote 9):

"We agree with the Respondents (Petitioners herein) that it is immaterial for purposes of this decision whether the carpenters were employees of Stanley or of Parker, who had contracted with Stanley to do certain work on the latter's residence, as set forth in the Intermediate Report."

Also (R. 58, footnote 17):

"Under the circumstances here present, we deem it immaterial whether the strike actually began on the afternoon of August 21 or on the following morning. Consequently, we do not rely on or adopt the Trial Examiner's finding that the strike did not actually begin until the morning of August 22."

In a concurring opinion the Chairman expressed the belief that the Board must assert jurisdiction since the General Counsel had "seen fit to prosecute", notwithstanding that *the controversy was "so local and so diminutive"* (R. 60).

In dissenting, the Hon. John M. Houston, a member of the Board, said (R. 61):

"I believe that the effect on commerce here is so remote and so insubstantial and that the controversy involved is so local in character as to make undesirable any exercise of the Federal power. I see no compulsive consideration in the legislative history of the amended statute which would indicate the contrary merely because the operation involved concerns the building and construction industry."

The Decision by the Court of Appeals

This decision confirmed the order of the Board and directed enforcement (181 F. 2d 126).

Summary and Concise Statement of the Case

The Statute Involved

This petition and the decision of the Court of Appeals involve the construction and application of Section 8(b)(4)(A) of the Labor-Management Relations Act, 1947, hereinafter called "the Act".

This statutory provision, as quoted in the opinion of the Court of Appeals, reads (R. 187):

> "'Sect. 8 * * * (b) It shall be an unfair labor practice for a labor organization or its agents— * * * (4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials or commodities or to perform any services, where an object thereof is: (A) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person: * * *' [158(b)(4)(A), Title 29, U. S. C. A.]."

The Trade Jurisdiction of the United Brotherhood and of Local 74

The Examiner found and the Board confirmed that the United Brotherhood and Local 74 had, within its trade jurisdiction, the crafts of carpentry and laying of coverings for floors and walls; that Local 74 had, among its

members, craftsmen competent to perform work similar to that of Watson's installation employees; that the Working Rules of the Local had long provided that no member "shall be permitted to work on any job" "with a non-union carpenter" for more than one day (R. 15, 19, footnote 15; Exhibits 2 and 3, Section 7, p. 4; and R. 9); and that (R. 21, 51):

> "Business Agent Henderson testified credibly that it was and had been for many years the practice of Local 74 not to permit their union members to work on a job where non-union workers were employed; that, in this instance, Local 74 ordered the work stoppage of its members when it learned that non-union employees of Watson's were also working on the Stanley residence; and that it would have been a violation of the rules of the Union for the carpenters to have returned to that particular job on August 22 or thereafter."

Stanley's Contract for a Union Job at his Residence

On July 31, 1947, George D. Stanley purchased a house near Chattanooga for occupancy as a private home for himself and his family exclusively (R. 88, 98). On August 4, 1947, he made a written contract with B. F. Parker (an independent union contractor and himself a member of the Petitioner, Local 74) to improve portions of the interior in ways including the installation of floor and wall coverings (R. 17, 18, footnote 13; 185). Stanley testified (R. 96):

> "I wanted Union men and had always enjoyed having Union men working, preferred them because I thought their work was better, and that Parker—*it was my understanding with Parker that Union men were going to do the work.*"

Stanley's contract with Parker was the usual cost-plus contract, including both materials and labor (R. 183). Parker had the sole right "to hire and fire" (R. 98, 137-8).

In accordance with Stanley's foregoing request Parker employed, for the renovation work in Stanley's residence, *solely union men* (R. 18; and footnote 13). Under the terms of their employment, Parker's employees could quit *at will* (R. 139, 157).

The court below has correctly stated (R. 189):

> "All workmen hired by Parker were union members, including carpenters who were members of Local 74."

The work in Stanley's residence thereupon started promptly. Stanley expressly admitted that the union "were doing their work satisfactory" (R. 103).

Stanley's Subsequent Contract with Watson's

While Parker and his union men were thus engaged in the satisfactory fulfillment of this contract, Stanley decided to have a floor and wall covering then in stock at the Watson's Store whose employees for installation were exclusively non-union men (R. 16, 79, 86-88, 90-91, 100, 103, 105, 136-7).

Because of Watson's employment of non-union men, Local 74 was then peacefully maintaining a single picket in front of the store (R. 16-17). The picket was withdrawn on or before August 28, 1947 (R. 16-17, footnote 11). The Examiner has reported that there is no evidence that Watson's lost business because of this picket (R. 23, footnote 24). Both the Examiner and the Board held that this brief, peaceful picketing was entirely lawful (R. 21-25, 58-9).

Stanley has repeatedly admitted that he knew, and was warned by Parker, that if, in the installation of the floor and wall coverings in his residence, he took the work of installation away from the union men and gave it to

Watson's non-union men, the union men would quit the job (R. 92, 100, 106, 140-1, 143).

Stanley, therefore, as was admitted by Watson's store manager, had first tried to buy the material from Watson's *separately*, in order that it could be installed by Parker's union men (R. 86).

Watson's, however, saw an opportunity to strike at the Local; and (as found by the Examiner and confirmed by the Board and the court below (R. 18, 50, 56, 189)), Watson's refused to sell the coverings to Stanley at all *unless they were installed by its own non-union employees.* Thereupon Stanley made a written contract with Watson's dated August 15, 1947, *whereby, for a lump sum, Watson's was to both "furnish and install"* (R. 90, 183). Thus, this contract was double barreled,—and designed by Watson's to be so. Both barrels were loaded and pointed directly at Local 74.

Stanley has admitted that he was well aware that this act on his part would be deemed an act of provocation against the union men and against the Union's Working Rule and its crafts jurisdiction (R. 92). Nevertheless, he told both Parker and Watson's manager (R. 140): "To hell with the Union. I'll do as I please".

Watson's Non-Union Men Take the Installation Work Away from the Union's Members

Watson's thereupon adopted the strategy of getting its employees surreptitiously into physical possession of the installation work at Stanley's residence by the stratagem thus stated by the Examiner (R. 18, 90-1, 175, 189):

> "The installation work (by Watson), estimated to take a week, was started on *Sunday*, August 17, when there were no other workmen present." (Italics ours.)

On the succeeding Monday and Tuesday, August 18 and 19, Watson's provocatively challenged the Union and its

members by taking over the installation work "during the regular working hours" (Examiner, R. 18). On Wednesday, August 20, two of the union carpenters stopped work for half an hour because of the presence of non-union men (Examiner, R. 18, 19).

The Union's Members Quit the Stanley Job on August 21

On August 21 the situation at Stanley residence was as follows (Examiner, R. 55; footnote 11):

> "There were but two groups of employees then on the job: the carpenters and Watson's installation employees."

About three o'clock in the afternoon of August 21 Henderson came to the Stanley residence and told both Parker and Stanley that the union men were packing up and leaving because the non-union men were taking over the installation work (R. 19, 95-6, 100, 103-4).

Stanley testified that the union men thereupon did "pack up and leave" (R. 97, 101). The court below has correctly stated that "they did not return" (R. 189-90); and the Examiner has found and the Board has confirmed (R. 21; footnote 20):

> "Business Agent Henderson testified credibly that * * * it would have been a violation of the rules of the Union for the carpenters to have returned to that particular job on August 22 or thereafter. * * *
>
> Henderson's testimony is also credited that in his capacity as business agent for the Union he was not asked at any time after August 21 by either Stanley or Parker to order the union carpenters to return to the Stanley job."

Both Parker and Henderson testified without contradiction or challenge that the union men were entirely willing to install Watson's coverings, and that on other jobs

they had installed "material furnished by Watson" (R. 133, 141).

Stanley testified that, when he asked Henderson how he could get the union men back, Henderson suggested that he cancel his contract with Watson's (R. 55, 190). The Board accepted this piece of testimony by Stanley (R. 57), notwithstanding that Henderson, Parker and others denied it (R. 151-2, 136-7, 155, 156).

Obviously, even if Henderson made this statement, it would merely express the consequence of *the installation clause* in Stanley's *unit* contract with Watson's.

Completion at Stanley's Residence in About a Week

The union men having withdrawn on August 21, the following transpired on August 22 and thereafter (to quote the Examiner) (R. 20):

> "On August 22nd Parker telephoned Watson's that the installation work could be resumed. Two or three days later Watson's men returned to the job and completed their work about August 28. In fact all the renovating of the Stanley house was completed on or about the end of August, the unfinished carpentry being completed by two of the four union men who had been on the job (at the urgent request of Parker), but without the knowledge or consent of the Respondents" (Petitioners herein).

The Examiner found and the Board confirmed (R. 27) that the Petitioners never picketed the Stanley residence, or threatened to do so, or solicited any of Watson's employees at that job not to work there, or attempted to prevent them from working there.

POINT I

The Facts found, conceded and undisputed establish, as matter of law, that there was no violation of Section 8(b) (4) (A) when Local 74 and its members withdrew from the Stanley job after he injected thereat non-union men to take over some of their employment.

Furthermore, upon such injection, the right of the union men to withdraw and the right of Local 74 to order a withdrawal followed as a matter of Common Law and Constitutional Law, and was recognized by the proviso at the end of Section 8(b) (4) and by Sections 7, 8(a), 13 and 502 of the Labor-Management Relations Act, 1947.

A

The Facts found, conceded and undisputed

The Board's Main Brief in support of its former opposition to the petition for certiorari made the following concession of fact as to the order given at the Stanley residence by the petitioner Jack Henderson, business agent for Local 74, on August 21, 1947 (p. 8):

> "Henderson gave the order in accordance with a long-standing rule of Local 74 not to permit its members to work on a job where non-union workers are employed."

The Working Rules of Local 74 (Respondents' Ex. 2, p. 4) provided that no member "shall be permitted to work on any job" "with a non-union carpenter" more than one day, or where laborers "perform carpenter work of any kind."

The Examiner found and the Board confirmed that (R. 51; 131-3):

> "Business Agent Henderson testified credibly that it was and had been for many years the practice of Local 74 not to permit their union members to work on a job where non-union members were employed; that, in this instance, Local 74 ordered the work stoppage of its members when it learned that non-union employees of Watson's were also working on the Stanley residence; and that it would have been a violation of the rules of the Union for the carpenters to have returned to that particular job on August 22 or thereafter."

The Examiner found and the Board confirmed, (R. 27; 51):

> "There was no attempt to prevent Watson's employees from working on this or any other job. There was no picketing or any of the usual methods used to persuade employees not to work—*simply a concerted refusal to continue working with the non-union workers, in accordance with long established union precedent.*"

The Examiner found and the Board confirmed (R. 21, footnote 20; 51):

> "Henderson's testimony is also credited that in his capacity as business agent for the Union he was not asked at any time after August 21 by either Stanley or Parker to order the union carpenters to return to the Stanley job."

The Examiner found and the Board confirmed (R. 15; 51):

> "The Local admits to membership carpenters and other craftsmen including those who perform work

similar to that of Watson's installation employees. It has jurisdiction over member workmen in Chattanooga and the surrounding area."

The Examiner found and the Board confirmed (R. 19, footnote 15; 51):

> "Local 74 admitted to membership, and actually had members who did the type of installation work performed by Watson's workers."

Stanley testified on direct examination by the Board's counsel (R. 96):

> "I wanted Union men and had always enjoyed having Union men working, preferred them because I thought their work was better, and that Parker—*it was my understanding with Parker that Union men were going to do the work.*"

The Examiner found and the Board confirmed (R. 18; footnote 13; 51):

> "Pursuant to the terms of this agreement (made by Stanley with Parker on August 15, 1947), Parker hired the necessary workmen, including members of Local 74, to do the carpentry work, secured such material as was indicated, and proceeded to renovate and improve the building in accordance with the specifications. * * *
>
> "*Parker was a member of Local 74, and all the workmen, besides the carpenters employed by him on the job, were union men.*"

Stanley admitted that Parker's men "were doing their work satisfactory" (R. 103).

The Examiner found and the Board confirmed that Parker warned Stanley that there would be "complications" (with Parker's union employees) if Watson's non-union workmen were injected on the job (R. 18; 51).

Stanley admitted that in Watson's store Parker told him that his carpenters were members of Local 74 and that "the union men are not going to work with their (Watson's) men" (R. 92).

The Examiner found and the Board confirmed the finding (R. 19; 51):

> "Watson's insisted on installing the coverings it sold."

Yielding to this insistence by Watson's, and notwithstanding Parker's warnings, Stanley, on August 15, 1947, made with Watson a written contract, drawn by Watson's, whereby for one lump sum Watson's secured *the undivided right both to furnish the materials and to install them at Stanley's residence.* That contract read as follows (R. 90; Board's Ex. 3; R. 92-3):

> "We propose to furnish *and install* rubber tile and cove base in your kitchen and three bathrooms for the sum of $376, which includes sanding and removing old linoleum.
>
> "We will furnish *and install* chromite wall coverings in kitchen and two baths 4 ft. high for the sum of $400.
>
> "It will be necessary for the walls to be a good, smooth, dry plaster before *we apply wall covering.*
>
> "In case you decide to have the third bath included for wall coverings you may add $99 to above figures." (Italics ours.)

The Examiner found and the Board confirmed (R. 18; 51, 175):

> "The installation work (by Watson), estimated to take a week, was started on Sunday, August 17, when there were no other workmen present."

The Examiner found and the Board confirmed (R. 19; 51):

> "On Wednesday, August 20, two of the carpenters stopped work for about half an hour because of the presence on the job of non-union installation workers."

Speaking of the next day (Thursday, August 21), the Board's decision states (R. 55, footnote 11):

> "There were but two groups of employees then on the job: the carpenters and Watson's installation employees."

The Examiner found and the Board confirmed that the petitioner, Henderson, came to the Stanley job for the first time in the afternoon of that day (August 21); and that Henderson (R. 19, 51) "told the four union carpenters then working on the job that they could not continue to work with non-union" men.

Stanley testified that this occurred "around three o'clock" (R. 103-4); that in the presence of himself and Parker, Henderson immediately told the men to "pack up your tools and get off the job" (R. 95-6; 100); and that they at once "started" to do so (R. 103).

Henderson testified without any contradiction whatever that Local 74 and its members were at all times willing to install the floor and wall coverings purchased by Stanley from Watson's; and that they had previously installed Watson's coverings at other jobs (R. 133; 141).

B

On the Facts found, conceded and undisputed, the members of Local 74 had a lawful right to withdraw, and Local 74 had a lawful right to order their withdrawal, from the Stanley job.

Such was their right under both Common Law and Constitutional Law.

(1) Upon the foregoing facts, the freedom of the Union and its members could not be nullified by the provocative unit contract which Stanley made at Watson's insistence, whereby, after Stanley himself had set up the work at his residence as an exclusively union job (R. 96), he injected non-union men to replace union men on a portion of the job (see pp. 11-12, *supra*).

Under this Point, we need not discuss whether the withdrawal of the union men on August 21 was a primary, as distinct from a secondary, boycott. The category of "boycott" is really not the determinative consideration. The conceded facts establish both a common law and a constitutional right on the part of the union men and of Local 74 to do just what they did on August 21. The subject of "boycott" will be discussed in Point II, p. 33, *post*.

The Union and its members were not bound by any law, and could not constitutionally be bound by any law, to acquiesce in this subsequent subversion by Stanley of the 100 percent union job and of their employment as he himself had originally bargained for and set up the job and the employment (R. 96).

Section 8(b)(4)(A) was never intended to be wielded by an owner as a sword for the subversion of union employment which he himself had created.

Stanley had, in the face of full warning, created his own dilemma. From that dilemma he could not extricate himself by forcing servitude and breach of obligation and

union practice and rules upon union members or the Union itself.

It was Stanley himself who subsequently introduced and initiated the element of provocation and force. He had at the outset of the work employed a union contractor and stipulated for the employment of union men (R. 96). While both the union contractor and the union men were satisfactorily performing the work at his residence, he sought by stratagem and forcible introduction of non-union men, to compel the Union and its members to share their employment with non-union men in the very same rooms and on the very same work which they were competent and willing to perform.

At common law Stanley's own action gave the union men an absolute right to withdraw, and also gave Local 74, as their bargaining agent charged with the duty of protecting their and its rights, the absolute right to order them to withdraw.

(2) If, under these circumstances, Section 8(b)(4)(A) can be deemed to nullify such right on their part or on the part of their Union, it would clearly be unconstitutional.

A contrary holding would abridge freedom of speech and association, deprive the petitioners of liberty and property without due process of law, exercise a power not delegated to the United States by the Constitution, and impose involuntary servitude in a case where punishment for crime is not involved.

We live in a free society and under a Constitution which guarantees a free society.

There can be no freedom and no free society if men, in time of peace, can be compelled to work against their will, or to sell their labor contrary to their own wish or for purposes which they deem contrary to their own interests, or to continue with or resume an at-will employment where the nature and substance of that employment and the work-

ing conditions have, according to their judgment, been changed to their disadvantage. (*Hotel & Restaurant Employees* v. *Greenwood*, 30 So. (2d) 696; cert. denied 332 U. S. 847, January 5, 1948.)

The liberties guaranteed by the Bill of Rights have their origin and substance in the common law, and include personal liberties and not merely political liberty or property rights.

Outstanding is the declaration of the Supreme Court in *Hunt* v. *Crumboch*, 325 U. S. 821 that (p. 824):

> "They (workmen) can sell or not sell their labor as they please."

In *Allgeyer* v. *Louisiana*, 165 U. S. 578, the Supreme Court said (p. 589):

> "The liberty mentioned in that Amendment (the Fourteenth) means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; *to live and work where he will;* to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned." (Italics ours.)

The language of the Fourteenth Amendment as thus interpreted by the Supreme Court is identical with the corresponding language of the Fifth Amendment directed at the national government.

To the same effect are:

Meyer v. *Nebraska*, 262 U. S. 390, 399;
Lawton v. *Steele*, 152 U. S. 133, 137;
Truax v. *Raich*, 239 U. S. 33, 41;
Baker v. *Daly*, 15 Fed. 2d 881, 882.

The following general statement of the constitutional principle embodied in these decisions occurs in 11 *Am. Jur. Constitutional Law*, 346:

> *"The liberty to terminate employment contracts is fully protected as far as the employee is concerned.* An act which requires one to remain in the service of another whom he does not desire to serve is invalid because an employee cannot constitutionally be compelled to work against his will for any employer and is at liberty to refuse to continue to serve him." (Italics ours.)

In *Arthur* v. *Oakes*, 63 Fed. 310, the Court said (p. 317):

> "It would be an invasion of one's natural liberty to compel him to work for or to remain in the personal service of another. One who is placed under such constraint is in a condition of involuntary servitude—a condition which the supreme law of the land declares shall not exist within the United States or in any place subject to their jurisdiction."

In *Bailey* v. *Alabama*, 219 U. S. 219, the Supreme Court declared unconstitutional as violative of the Thirteenth Amendment, a state statute which made the refusal or failure to perform labor contracted for without refunding the money or paying for property received, *prima facie* evidence of the commission of a crime as defined by a section of the Act. The Court said (p. 244):

> "Without imputing any actual motive to oppress, we must consider the natural operation of the statute here in question (*Henderson* v. *Mayor*, 92 U. S. 268), and it is apparent that it furnishes a convenient instrument for the coercion which the Constitution and the act of Congress forbid; an instrument of compulsion peculiarly effective as against the poor and

the ignorant, its most likely victims. There is no more important concern than to safeguard the freedom of labor upon which alone can enduring prosperity be based."

The Supreme Court also said, concerning the Thirteenth Amendment, page 241:

"* * * The plain intention was to abolish slavery of whatever name and form and all its badges and incidents; to render impossible any state of bondage; to make labor free, by prohibiting that control by which the personal service of one man is disposed of or coerced for another's benefit which is the essence of involuntary servitude."

(3) These constitutional guarantees necessarily guarantee the right of a union man to decline to work on the same job and cooperatively with non-union men, particularly where the work being done by the non-union men is part of the work for which the union men were themselves employed and part of the jurisdiction or craft of the union.

These constitutional guarantees also assure the right of unions to adopt working rules and practices such as the Examiner found here established "for many years" (R. 21).

As said in *Coppage* v. *Kansas*, 236 U. S. 1, pages 19-20:

"* * * Can it be doubted that a labor organization —a voluntary association of working men—has the inherent and constitutional right to deny membership to any man who will not agree that during such membership he will not accept or retain employment in company with non-union men? Or that a union man has the constitutional right to decline proffered employment unless the employer will agree not to employ any non-union man? * * *"

In *Bossert* v. *Dhuy*, 221 N. Y. 342, the New York Court of Appeals said, pages 354-5:

> "It is unnecessary in the case now under consideration to hold that in all cases and under all circumstances, whatever a man may do alone he may do in combination with others, but it was clearly established in the National Protective Association case that workingmen may organize for purposes deemed beneficial to themselves and in that organized capacity may determine that their members shall not work with non-members or upon specified work or kinds of work.
>
> "It was not illegal, therefore, for the defendants to refuse to allow members of the Brotherhood to work in the plaintiffs' mill with non-union men. The same reasoning results in holding that the Brotherhood may by voluntary act refuse to allow its members to work in the erection of materials furnished by a non-union shop. Such action has relation to work to be performed by its members and directly affects them. The voluntary adoption of a rule not to work upon non-union made material and its enforcement differs only in degree from such voluntary rule and its enforcement in a particular case."

In *Stapleton* v. *Mitchell*, 60 Fed. Sup. 51, appeal dismissed, 326 U. S. 690, the Court held unconstitutional a Kansas statute which made it unlawful for an employee to "refuse to handle, install, use, or work on particular materials or equipment and supplies because not produced, processed, or delivered by members of a labor organization." The Court said (p. 61):

> "The right to peaceably strike or to participate in one, to work or refuse to work, and to choose the terms and conditions under which one will work, like the right to make a speech, are fundamental human liberties which the state may not condition or abridge in the absence of grave and immediate danger to the community."

In *Alabama State Federation of Labor* v. *McAdory*, 18 So. 2d 810, the Supreme Court of Alabama reviewed the constitutionality of Section 12 of an Alabama statute regulating labor unions. Section 12 made it unlawful for any employee to refuse to handle any work or materials, etc., because not produced or delivered by union members. The Court held this section of the Act unconstitutional on the ground "that it violates fundamental and basic civil rights as guaranteed under the Fourteenth Amendment."

(4) Moreover, the right to sell or not to sell one's labor or services is *not only a right of liberty but a right of property.* As a right of property it is equally protected by the constitutional guarantees.

Coppage v. *Kansas*, 236 U. S. 1, 14;
Adair v. *U. S.*, 208 U. S. 161, 173-175;
Bogni v. *Perotti*, 112 N. E. (Mass.) 853, 855;
State v. *Stewart*, 59 Vt. 273, 289.

C

Moreover, the right of the union men to withdraw, and the right of Local 74 to order a withdrawal, are recognized by the proviso at the end of Section 8(b)(4) and by Sections 7, 8(a), 13 and 502 of the Labor-Management Relations Act, 1947.

(1) The proviso at the end of Section 8(b)(4) reads:

> "*Provided*, That nothing contained in this subsection (b) shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the the employees of such employer are engaged in a strike ratified or approved by a representative of such employee whom such employer is required to recognize under this Act."

Section 7 of the Act reads:

"Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3)."

Section 8(a) of the Act, so far as pertinent, reads:

"Sec. 8.(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7,

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided*, That subject to rules and regulations made and published by the Board pursuant to section 6, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay."

Section 13 of the Act reads:

"Sec. 13. Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications of that right."

Section 502 of the Act reads:

> "Sec. 502. Nothing in this Act shall be construed to require an individual employee to render labor or service without his consent, nor shall anything in this Act be construed to make the quitting of his labor by an individual employee an illegal act; nor shall any court issue any process to compel the performance by an individual employee of such labor or service, without his consent; nor shall the quitting of labor by an employee or employees in good faith because of abnormally dangerous conditions for work at the place of employment of such employee or employees be deemed a strike under this Act."

(2) If the withdrawal of the union men on August 21 from Stanley's premises be deemed "a strike" within the definition in Section 501 of the Act, then such strike must be deemed "ratified or approved" within the terms of the foregoing *proviso* at the end of Section 8(b)(4). The *Board's own case* shows that the petitioner Jack Henderson gave an order to withdraw on that day; that Henderson, as the Business Agent of Local 74, was the representative of its members employed on the Stanley job; that he approved the withdrawal, and, indeed, ordered it; and that the union men and Local 74 did not thereafter return to Stanley's premises, and were never asked to either by Stanley or by Parker. (See p. 13, *supra*.)

In consequence, when they refused to remain on the Stanley premises and did not return thereto, the statutory proviso above quoted exempted both them and the Local from the operation of Section 8(b)(4)(A), even assuming that otherwise it was or could be applicable.

(3) Legality was likewise established by Section 7 of the Act.

The union men on the Stanley job were on August 21, 1947 members of Local 74 which had been organized (to quote Section 7)

> **"to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."**

Under the common law, under constitutional law and under this Section 7, such "self-organization" for such purposes, and the right to engage in other "concerted activities" for the effectuation of such purposes, were lawful.

In aid of such purposes the Local and its members had the lawful right to adopt what the Examiner and the Board found to be the "long-standing rule of Local 74 not to permit its members to work on a job where non-union workers are employed"—a rule which the Examiner and the Board found to be "in accordance with long-established union precedent" (R. 27; 51). (See pp. 9-10, 16, *supra.*)

Obviously such a rule and purpose were vitally important, indeed essential, to any union, in order to strengthen its means to bargain collectively, and to furnish its members with "mutual aid or protection".

When Stanley contracted with Parker as a union contractor and member of Local 74 to do the work at his residence, and requested and stipulated that it be done with union men (R. 96), that contract necessarily recognized and implied assent to this familiar "long-standing rule" and well-known "long-established union precedent". Furthermore, by the very fact that it was negotiated and made as a union contract, it was in itself an act and result of collective bargaining and established the working conditions; and it recognized and adopted the union principle whereby the employment was under the shield of the

mutual aid and protection which union membership and the Local provided.

In consequence, when Stanley, while the work was in satisfactory progress, injected non-union men into the employment, he breached and subverted the whole union status of the job as established by the collective bargain which he himself had made (R. 96). Thereby he set in motion the right of the union employees by concerted action to stand together through their Local for "mutual aid or protection" in their employment. (See pp. 20, 27, *supra.*)

(4) Legality was also established by Section 8(a) of the Act.

Stanley's action in subverting the union employment which, he admitted (R. 96), he himself had requested and stipulated for, was a coercion of the union men and Local 74 to surrender some of the work to non-union men, to share some of the job and to work thereon with non-union men, and to disregard and treat as inapplicable to his job the long-established working rules of the Local and the "long-established union precedent" of organized labor, which were an essential part of union concerted action "for mutual aid or protection".

Thereby also, Stanley undertook "to dominate or interfere with the administration of" Local 74.

There is no contradiction of Parker's testimony that before signing the unit contract with Watson's for installation by Watson's non-union employees, Stanley said to Parker and to Watson's store manager (R. 139):

"To hell with the Union. I'll do as I please."

(5) Legality was also established by Section 13 of the Act.

That Section declares the basic purpose of the Act not "to interfere with or impede or diminish *in any way* the right to strike". The only exception is "except as specifically provided for herein".

No rule of statutory construction is better settled than that where a statute expresses a general recognition of a basic common law and constitutional right, such recognition must be construed broadly and in obedience to the presumption that the legislature intended no exemption from or subversion of such basic right beyond what is clearly and specifically expressed; and that, in consequence, any exception must be construed narrowly and guardedly.

Under this Act, before the right to strike can be deemed interfered with, impeded or diminished by the Act, there must be found in the Act clear language by which such limitation is "*specifically* provided for". The dictionary definition of "specifically" is "definitely", "explicitly".

(6) Legality was also established by Section 502 of the Act.

That Section opens with a broad and comprehensive exclusion,—"Nothing in this Act shall be construed to require", etc. The Act shall not be deemed to force any one "to render labor without his consent", or to make "the quitting of his labor an illegal act".

In the present instance the "long-standing rule of Local 74" against working on the same job with non-union men antedated the Act by decades, and was "in accordance with long established union precedent" throughout organized labor. (See pp. 9-10, 16, *supra.*)

When Stanley, in the face of warning as to this rule, provocatively subverted the agreed union status of the job at his residence, he had no right to be aggrieved by his own act in bringing the rule into operation, or to complain of the action of the Local and its members in quitting the job. Certainly, he had no right thereafter to require them to continue "to render labor" without their consent.

In giving the so-called order to withdraw, the petitioner Jack Henderson was acting merely as the voice of the rule,—as the mouthpiece of the "long established union precedent". He was performing a ministerial duty; and the men were performing their duty as members of the Local and were exercising their rights as free men.

While the union men were working at Stanley's residence under union conditions of employment pursuant to Stanley's union contract with Parker, they were there as members of Local 74 and under union conditions of employment as established by that Local's Working Rules. In their persons Local 74 was on the Stanley job,—on the Stanley premises. They were its representatives and members there. The Local was in no sense an outsider or stranger to the Stanley job or to the employment there. It was the "self-organization" of all its members,—the medium of their "concerted activities for mutual aid or protection",—their representative under a contract embodying the process and result of collective bargaining and the working conditions thereby established.

The withdrawal on August 21 was a collective act. Local 74 and its members went off the Stanley job and premises. This it and they had the right to do,—under the common law, under the United States Constitution, and under the Act itself.

POINT II

Even if, notwithstanding the considerations presented in the preceding Point, the term "boycott" could have relevancy, the facts found, conceded and undisputed establish a primary rather than a secondary boycott.

(1) Section 8(b)(4)(A) is understood to be directed against a so-called secondary boycott.

The accepted distinction between a primary and a secondary boycott is that the former runs primarily against the job struck by reason of some action or non-action of the employer or owner directly concerning the employment, whereas a secondary boycott merely makes a pawn of the employer for the purpose of coercing a third party who has no concern with the employment. A primary boycott may incidentally have repercussions as regards other employers or as regards third persons having dealings with the employer struck; but such is merely the inevitable indirect or incidental consequence of the primary conflict.

In a debate preceding the enactment of the Labor-Management Relations Act, 1947, Senator Taft said concerning Section 8(b)(4)(A) (93 Daily Congressional Record, p. 4323, April 29, 1947):

> "This provision makes it unlawful to resort to a secondary boycott to injure the business of a third person who is wholly unconcerned in the disagreement between an employer and his employees."

The facts found, conceded and undisputed as set forth in the preceding Point (p. 15, *supra*) demonstrate as a matter of law precisely what the Examiner found and the Board confirmed (R. 27; 51):

"There was no attempt to prevent Watson's employees from working on this or any other job. There was no picketing or any of the usual methods used to persuade employees not to work—*simply a concerted refusal to continue working with the non-union workers, in accordance with long-established union precedent.*"

In other words, the withdrawal of Local 74 and its members from the Stanley job on August 21 synchronized with and was the consequence of Stanley's injection of non-union men to take over from the union men a portion of the employment which Stanley himself had set up at his residence as a wholly union employment (R. 96). Thereby Stanley undertook to force the union men to share the job and to work side by side and cooperatively with non-union men.

There is not a particle of evidence that, if Stanley had not wrought and insisted upon this injection in the face of repeated warnings that the consequence would be just what it was, the withdrawal would have occurred at all.

There is not a particle of evidence that, if Stanley had not lent himself to the anti-union purpose of Watson's in refusing to sell the materials except as part of a unit contract which integrated with the sale installation by Watson's non-union men, any withdrawal would have happened at all.

On the contrary, Henderson testified without contradiction that the members of his Local had on other occasions installed materials bought from Watson's (R. 131, 141). (See p. 19, *supra*.) Both Stanley and Watson's knew this, because Stanley first endeavored to buy the materials and to turn them over to Parker for installation by the union men, in precise accordance with the terms of his contract with Parker which was the ordinary cost-plus contract covering both materials and labor (R. 86). But,

as the Examiner found and the Board confirmed (R. 18; 51, 56, 189):

> "Watson's insisted on installing the coverings it sold."

Stanley yielded to this pressure; signed the unit contract; and declared (R. 139): "The hell with the Union. I will do as I please."

Of course, by such a provocative action on Stanley's part in alliance with Watson's (or, if one prefers, on Watson's part in alliance with Stanley), and by Stanley's subversion of his own contract with Parker and of the one hundred percent union status of the employment as requested and bargained for by Stanley himself (R. 96), the Local and its members became entitled, indeed were driven, to defend the basic principle in organized labor that union men would not continue on a job where the employer later insisted on bringing in non-union men to share the work.

Hence, if the withdrawal can be called a "boycott" at all, it was primary. Its immediate cause and gravamen was Stanley's own act in impairing and subverting the union working conditions which he himself had established at his residence (R. 96).

(2) In the second place, when on August 15, 1947, Stanley yielded to Watson's insistence that it would not sell except on condition that it also install by its own non-union employees, Watson's and Stanley became allies as against the 100 percent union employment which by contract with Parker Stanley himself had already created at his residence (R. 96).

By that alliance, Stanley and Watson's made applicable to the Stanley job the "doctrine of enmeshed employment" which is expounded in *Douds* v. *Metropolitan Federation of Architects*, 75 Fed. Supp. 673 (Judge Rifkind).

In that case there was a strike against an engineering firm, called Ebasco. The purpose of the strike was to secure a better employment agreement. After the strike began, Ebasco transferred a large part of its remaining work and employees to another engineering firm, called Project, which had previously done sub-contracting work for Ebasco. Project was therefore also boycotted. Holding the boycott not to be secondary action, the court said that the words in Section 8(b)(4)(A) "doing business" were to be read "with the aid of the glossary provided by the law of secondary boycott"; and that (pp. 676-7)

> "To suggest that Project had no interest in the dispute between Ebasco and its employees is to look at the form and remain blind to substance. In every meaningful sense it had made itself party to the contest. Manifestly it was not an innocent bystander, nor a neutral. It was firmly allied to Ebasco and it was its conduct as ally of Ebasco which directly provoked the union's action.
>
> "* * * In encouraging a strike at Project the union was not extending its activity to a front remote from the immediate dispute but to one intimately and indeed inextricably united to it. See Bakery Drivers Local v. Wohl, 1942, 315 U. S. 769, 62 S. Ct. 816, 86 L. Ed. 1178; cf. Carpenters Union v. Ritter's Cafe, 1942, 315 U. S. 722, 62 S. Ct. 807, 86 L. Ed. 1143."

In the present instance the Stanley residence was the place both of the established union employment, of the later injection thereon of non-union men by Watson's and Stanley as contracted allies, and of the consequent withdrawal of Local 74 and its members. After full warning and with intention aforethought, these allies jointly provided the *casus belli* at the job; and neither can be heard to claim that the resultant retirement of Local 74 and its members from the field on which the allies marched their

non-union men was otherwise than the sequence of cause and effect set in motion by themselves.

Whether or not, in view of Stanley's cost-plus contract with Parker for both materials and labor, Stanley and Watson's had the right to ally themselves to impair and invade that contract, the right of Local 74 and its members to take concerted action for mutual aid and protection and in observance of the essential working rule of organized labor, could not possibly be impaired, diminished or interfered with.

In *Denver Building Trades Council* v. *National Labor Relations Board*, 26 LRRM 2515, not yet officially reported, the United States Court of Appeals for the District of Columbia Circuit applied this doctrine of enmeshed employment and alliance to a case where the purpose of the picketing was to preserve the all-union character of the job by bringing the job to a standstill until non-union electricians brought on the job by a subcontractor were replaced. The court held that this union activity, termed a boycott, was a lawful primary strike and was not a secondary boycott in violation of Section 8(b)(4)(A). The court said that the union's action was "in protest against the employment there of the non-union electricians."

Precisely such was the withdrawal by Local 74 and its members from the Stanley job. It was a protest against, and occasioned by, the injection thereon of non-union men to usurp some of the employment on which the union men were engaged.

(3) In the third place, Section 8(b)(4)(A) is limited in its terms and effect to outlawing strikes where an object is to require any person "to cease doing business with any other person."

Obviously such a provision does not apply to a situation where, as in the building construction industry, there

is a general contract and a sub-contractor working on a single building project, and the labor stoppage is caused by anti-union action by the sub-contractor.

In *Mills* v. *United Association*, 83 Fed. Supp. 240, the court held that the relationship between a principal and a sub-contractor arising out of the awarding of a sub-contract was not a "doing business" between the parties within the meaning of Section 8(b)(4)(A). Said the court (p. 245):

> "The allegations of the complaint, which must be taken as true, state that the strike was called or engaged in because the employer was associated with or had contracted with an individual or a group who were obnoxious to the organized labor group. It is not a question of striking to force the employer to join any group; the absolute reverse is apparent from the pleadings. * * * As said by Judge Rifkind, in the Douds case, supra, it is my view that the words 'or to cease doing business with any other person' have reference to that which precedes it and must be construed in connection with the question of secondary boycott. It is simply another definition or a further spelling out of the definition of what is necessary to create a secondary boycott. It means 'doing business' as we ordinarily understand it between parties other than those to the particular contract or their allies. For that reason, it is my view that the complaint does not allege a cause of action under section 187, supra."

Thus the phrase "doing business" means business transactions which take place otherwise than between parties to a particular contract or between their allies in the matter of employment. This principle, applied to the present case, obviously excludes the withdrawal of Local 74 and its members on August 21 from classification as a violation of Section 8(b)(4)(A) and from classification as a secondary boycott.

Stanley had, as regards the installation involved, forced Watson's upon Parker as a sub-contractor or substitute. In either case, the refusal of Local 74 and its members to accept the anti-union joint action of Stanley and Watson's and to continue on the premises in face of the substitution, cannot be deemed within either the letter or the spirit of Section 8(b)(4)(A).

POINT III

The Finding by the Board, confirmed by the Court below, that on August 21 Stanley asked Henderson how the union men could be brought back and "Henderson suggested that Stanley cancel his contract with Watson as a means of getting the carpenters to return to work" (R. 57), in no way justifies either a finding or a conclusion that Henderson and the Local were guilty of an unfair labor practice under Section 8(b)(4)(A).

(1) The Board deduced from the foregoing finding that an object of the withdrawal was to force Stanley to cease doing business with Watson's (R. 54-5).

Aside from the fact that this testimony by Stanley was explicitly denied by Henderson, Parker, Rose, Stewart and Larkin, all of whom were present at the time (R. 151, 136-7, 154-5, 156), the legal fallacy behind the Board's finding and in the legal consequences which it draws therefrom lies in the over-simplification and in ignoring and even distorting the setting and the order of events as established by the admitted facts and other findings.

(2) After having admittedly requested and set up the work in his residence, including the installation of floor and wall coverings, as an exclusively union job by a union contractor who was a member of the Union, Stanley ad-

mittedly and deliberately made a unit contract with Watson's (a non-union employer) whereby Watson's, for a single lump sum, was *both "to furnish and install"* (R. 183),—and this in the face of admitted warnings that the union men would not continue in their work on the job if he thus transferred the installation of floor and wall coverings to non-union men employed by a non-union employer (R. 92, 100, 106, 139, 142).

The carrying out of that contract necessarily meant that Stanley was, by his own act, changing the 100% union job, which he had himself set up, to a partly non-union job whereby the installation was transferred from the union contractor and his union employees to a non-union contractor and to his non-union employees.

In consequence, even if Henderson *did* make the statement to which Stanley testified, *Henderson was right.* As long as *installation* remained an integrated part of the Watson contract, the Union and its members would not acquiesce in this subversion by Stanley of the 100% union job and of their union employment which he himself had originally set up and stipulated for.

Any consequence was an incident of Stanley's own act and object.

There is neither contradiction nor challenge of the testimony of Henderson and Parker that the Union and its members were at all times willing themselves to lay Watson's materials and had done so on other occasions (R. 133, 141).

Indeed, Watson's store manager himself confirms this testimony as to the union's willingness to lay Watson's materials, because he testified that Stanley at first tried to buy Watson's material *without* installation by Watson's men, but that in this instance Watson's refused to sell the material unless it also installed it by its own non-union men (86).

Watson's saw an opportunity to strike at the Local and to cause it to lose strength and jobs. Its store-execu-

tive, according to the uncontradicted testimony of Parker, said that "all in the world that we want is a chance" at the Local, and boasted to Stanley of the alluring prospect of recovering from the Local $60,000 in damages unless its members would submit to working with Watson's non-union men after the latter took over some of their employment (R. 139-40). Accordingly (to quote the finding of the Examiner, confirmed by the Board) (R. 18, 51):

> *"Watson's insisted on installing the coverings it sold."*

It is also highly probative of the ulterior purpose of Watson's that Mr. Smith, Watson's manager, professed before the Examiner to be unable to state how much in the contract price represented material and how much labor (R. 120); and also that he reluctantly admitted that as far back as "sixty days" prior to his testifying on October 24, 1947, Watson's regularly sold floor and wall coverings without insisting that its own employees install the same (R. 84-5).

Thus, the labor disruption at Stanley's residence was both *primary and direct* as between Stanley and the Union both in its origin and in its result. It was the consequence of Stanley's own subversion of the union men's working conditions at his residence. It was neither secondary nor a boycott of any merchandise whatever. The same result would have happened if non-union substitutes had been sent in from any other source. The consequence as regards Stanley's contract for installation by Watson's was created by Stanley himself and incidental to his own chosen object.

As long as Stanley's contract with Watson's *for installation* stood, the union men would not and could not continue on the job. If Stanley wanted the union men to stay on the job, then, as Henderson said, the *installation* must be by them and not by Watson's non-union men.

On the other hand, since Stanley had chosen *installation* by Watson's non-union men, the union men would withdraw.

In other words, the event on August 21 concerned not the material but the Working Rule, the original agreement for union employment and the crafts jurisdiction of Local 74 (R. 141).

It was Stanley who had introduced and initiated the agreed union status of the work at his residence; and as long as he insisted on maintaining subversion thereof, the union men could not return.

It was he who had first formed "an object",—an object adverse to the Union and to the union employment which he himself had contracted.

Obviously, Section 8(b) (4) (A) was never intended to be thus wielded by an owner *as a sword* for the subversion of union employment which he himself had created.

Since Watson had with purpose, and Stanley had by contract, created this act of aggression, how could the union or its members be expected—much less required—to continue with or return to the work in the face of the continued aggression thus enforced?

How, under the conceded circumstances and under the Act and the Federal Constitution, could the freedom of the union and its members be nullified by this provocative contract with Watson's?

The Examiner found and the Board confirmed (R. 21, 50) that Stanley continued to insist that the installation be carried on by Watson's non-union men; and the Examiner further found and the Board confirmed (R. 21, footnote 20; 50):

> "Henderson's testimony is also credited that in his capacity as business agent for the Union he was not asked at any time after August 21 by either Stanley or Parker to order the union carpenters to return to the Stanley job, but that if he had been so requested he could not have ordered the men to return without a special dispensation from Local 74."

POINT IV

Moreover, Section 8(b) (4) (A) was not in effect when the Union and the union men withdrew from the Stanley job on August 21, 1947, immediately following Stanley's injection of non-union men into their employment.

In consequence, the petitioners were not guilty of an unfair labor practice on August 22 when the Section took effect, in not thereupon rescinding the withdrawal and thus requiring the union men to return to the different, non-union and less advantageous employment and working conditions which Stanley had created several days before.

(1) This is not a case which can be argued as if Stanley had not, just before Section 8 of the Act took effect on August 22nd, converted what he himself had set up as a union job into a non-union job.

The Union and its members had accepted the employment at will in Stanley's residence because the employment was by a union contractor (a fellow member of their own Local 74) and because Stanley himself had asked Parker to employ union men to do the job (R. 18, footnote 13; 96). *It was a union job 100%* (R. 18, footnote 13).

But when on August 15, 1947, by contract with Watson's, Stanley took the laying of the wall and floor coverings from Parker and his union employees and transferred it to Watson's non-union employees, and on August 18 had caused the latter to take over the installation "during the regular working hours" (R. 18, 175), the entire base, extent and conditions of the employment of the union men became changed by Stanley's own act.

Hence, when Section 8 of the Act took effect on August 22nd any rescission by the petitioners of the decision

and concerted withdrawal of the day before (entirely lawful when made) would have required the union men and the Union itself to accept a relationship to the job and an employment and working conditions which were completely different from and less advantageous than what they had originally agreed to and what Stanley had originally set up and stipulated for (R. 96).

Hence, we respectfully submit, the Board and the Court below, in holding that the Petitioners were bound to rescind when Section 8 took effect, completely overlooked that thereby an employment relationship would have come into existence altogether different from that which had been originally agreed to by Stanley, Parker and the Union.

Certainly no provision of the Act condemns as an unfair labor practice any failure or refusal to create or accept new and less advantageous terms of employment, or new and less advantageous working conditions, or a transfer of current jobs from the union employees of the union contractor to the non-union employees of a non-union contractor.

When the union men quit on August 21 everyone understood that their quitting was as permanent as was Stanley's switch of the installation work to Watson's non-union men (R. 83, 95, 96-7, 103-4, 110, 124, 136-7, 152, 154). Indeed, the Examiner has found and the Board has confirmed, in accordance with undisputed testimony (R. 21, and footnote 20; 51):

> "On August 22nd Parker telephoned Watson's that the installation could be resumed. Two or three days later Watson's men returned to the job and completed their work about August 28. * * *
>
> "Henderson's testimony is also credited that in his capacity as business agent for the Union *he was not asked at any time after August 21 by either Stanley or Parker to order the union carpenters to return to the Stanley job.*" (Italics ours.)

(2) The decisions cited by the Board and the Court below have no parallelism in their facts.

If the petitioners had rescinded on August 22 or thereafter and the union men had been sent back to the Stanley job, the union and its members would have been accepting fewer jobs, less work and less advantageous terms of employment and working conditions than they, Stanley and Parker had agreed upon when the work was first undertaken in the early part of August.

There are no such determinate facts in any of the cases cited by the General Counsel or the Court below. In all those cases the so-called strike was for better terms,—not because the existing agreed terms had been withdrawn, breached or subverted by the owner.

(3) Moreover, there is no provision in the Labor-Management Relations Act, 1947 which, in the face of Stanley's own action just before Section 8 took effect, laid any such compulsion on either the petitioners or the union men, or required submission to any such subversion of the original employment.

In his decision in this matter, denying the General Counsel a preliminary injunction, Judge Darr had said (74 F. Supp. 499, 501):

> "Certain it is that the Act is prospective in its intentions. * * * These words (Section 8(b) (4) (A)) appear to clearly indicate the affirmative action in striking or failing to perform services and not a continuation of a condition that was lawfully set up prior to the enactment of the Act. * * * I have concluded that this is not a case under the Act."

This judicial language is the more applicable since if the Act does not extend to "a continuation of a condition that was lawfully set up prior to the enactment of the Act", then *a fortiori* it does not project the requirement of future acceptance of terms, extent and nature of employment less advantageous than had been lawfully set up prior to the enactment of the Act.

As said by this Court in *Shwab* v. *Doyle*, 258 U. S. 529, 534:

> "The initial admonition is that laws are not to be considered as applying to cases which arose before their passage unless that intention be clearly declared. 1 Kent. 455; *Eidman* v. *Martinez*, 184 U. S. 578; *White* v. *United States*, 191 U. S. 545; *Gould* v. *Gould*, 245 U. S. 151; Story, Const., §1398. The comment of Story is, 'retrospective laws are, indeed, generally unjust; and, as has been forcibly said, neither accord with sound legislation nor with the fundamental principles of the social compact.'"

See also *White* v. *United States*, 191 U. S. 545, 552.

(4) Moreover, in the cases cited by the General Counsel, the owner had not created new and adverse labor relationships shortly before the Act took effect.

They were all cases where there had been a prior refusal to grant or to bargain over demands for better wages or working conditions, and where, after the Act took effect, there were *overt affirmative acts* for the purpose of additional pressures to obtain such betterments. (See, for example, *Jeffery-DeWitt Insulator Co.* v. *National Labor Relations Board*, 91 F. 2d 134, 139.)

In the present case, there is neither claim nor proof that after August 21, 1947, the petitioners or the members of the Local took any overt or affirmative action whatever on or against the job at the Stanley residence, or even picketed it or threatened to picket it. The Examiner and the Board expressly found that there were no such overt acts (R. 27, 51, 58, 59).

(5) Since Stanley, with the cooperation of Watson's, had chosen to terminate the old and agreed conditions before Section 8 took effect, he could not thereafter invoke Section 8 to bring about an enforced acceptance of the new conditions which he had chosen to substitute.

POINT V

Should Section 8(b) (4) (A) be so interpreted and applied as to have required the Petitioners on August 22nd to "rescind" the so-called "Order" of August 21st and thus require the union men to return to the lesser employment under non-union conditions substituted by Stanley, such an interpretation and application of the Section would violate the First, Fifth, Tenth and Thirteenth Amendments to the Constitution of the United States.

(1) On uncontradicted testimony the Examiner found and the Board confirmed that the traditional union practice and this Union's Working Rule against sharing a job with non-union men had been in force and observed "for many years"; that Henderson's so-called "order" was in obedience to it; that the withdrawal on August 21 had been "in accordance with long established union precedent"; and that the return of the union men on August 22 "would have been a violation of the rules of the Union" (R. 21, 27, 51, 59).

The Board's own Brief in the court below conceded that "it would have been a violation of petitioner union's rules for the carpenters to have returned to the Stanley job on August 22 or thereafter" (p. 8).

Observance on August 21 of that traditional union practice and of this Working Rule was, it is undisputed, wholly lawful. How then, constitutionally speaking, could its continued observance on August 22 become *ex post facto* unlawful?

This Working Rule was lawful when made. It had been given sanction and obligation by the United Brotherhood itself (Respondents' Ex. 3, Section 7, p. 4). Similar rules, as the decisions of the courts show, are familiar and long-standing tenets of Organized Labor. Without such rules

and practice Organized Labor could easily be disrupted by its enemies and by non-union labor.

Furthermore, this traditional practice and this Working Rule constituted a lawful part of the mutual *contract* between the members of the Local, *and a lawful part of the agreement with Stanley* when he requested of Parker that all employees on the job be, like Parker himself, union men (R. 96).

The officers of the Local were merely the agreed spokesmen and representatives of the members for the observance of this essential union practice and of the agreed working conditions. For that purpose Henderson was acting merely as the agent of all the Local's members, both on and off the Stanley job.

(2) Lawful observance of the agreed working conditions set up by Stanley himself (R. 96) and of the traditional practice and the Working Rule, once begun, could not be outlawed and the opposite rendered directly or indirectly compulsory by subsequently effective legislation.

Such subsequent legislative requirement or coercion would violate the First, Fifth, Tenth and Thirteenth Amendments to the Constitution of the United States.

It would abridge freedom of speech, deprive the petitioners of liberty and property without due process of law, exercise a power not delegated to the United States by the Constitution, and impose involuntary servitude in a case where punishment for crime is not involved.

See the decisions cited and discussed under Point I, Subd. B, pages 20-6, *supra*.

POINT VI

The Court below erred in holding that the Board had jurisdiction.

The brief construction job in Stanley's private residence was so essentially local, separate and transitory as not to fall within the interstate commerce clause, and hence not within the Labor-Management Relations Act, 1947.

The predicates implicit in the General Counsel's argument and the decision below, as applied to the facts of this case, would endanger our federal system and trade unionism, would wipe out the distinction between interstate and intrastate commerce, and would bring the entire building industry, however local the construction, under federal control and under the Taft-Hartley Act.

Not only was the Stanley matter purely local, but it all took place and was over, and all the improvements in his house were completed, within a week (R. 18-19, 20, 56).

It was as transient as it was local, and fully justifies our respectful opinion that if ever there was a tempest blown up in a local teacup, this proceeding is it.

A

Constitution of the United States—Article I, Section 8(3)

"The Congress shall have Power—* * *

"*Regulation of Commerce.*—3. To regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes."

Labor-Management Relations Act, 1947—Sec. 2 (6)

When used in this subchapter—

(6) The term "commerce" means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign conntry.

(29 U. S. C. Sec. 152 (6))

Labor-Management Relations Act, 1947—Sec. 2 (7)

When used in this subchapter—

(7) The term "affecting commerce" means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

(29 U. S. C. Sec. 152 (7))

B

Senator Taft

There are many authoritative voices that the Act has, and can have, no general application to a local construction job or to a local building union performing a local job. *A fortiori*, it can have no application to the installing of imitation tile in Stanley's home in Chattanooga.

In the New York Journal-American of July 7, 1947, *Senator Taft*, in a signed statement under the heading "Sen. Taft Explains New Labor Act," made the following answer to the following question:

> "52—Q. Will this prevent jurisdictional strikes in the construction industry?
>
> "A. The construction industry ordinarily would be intrastate commerce and would not be affected by the Act. Of course, there are instances where it is interstate commerce, and in such cases the employer can obtain a decision from the National Labor Relations Board settling the jurisdictional dispute."

In *Colliers Magazine* for March 6, 1948 (Volume 121, No. 10) *Senator Taft* reported on the first few months of the Act's operation. In an article entitled, "Toward Peace in Labor", he said at page 39:

> "I might say, however, that I don't think Congress intended that this provision (closed shop) extend to local building-trade unions whose work is, in fact, *intrastate* in character. The status of such unions ought to be left to the State Law." (Parenthesis and italics ours.)

C

Decisions by this Court

Levering & Garrigues Co. v. *Morrin*, 289 U. S. 103, 107, is a conclusive authority *a fortiori*. It involved a suit to enjoin the defendant union and employer association from compelling or conspiring to compel the petitioners to employ in their work of fabricating and erecting structural steel and iron only members of the labor union. The Supreme Court, in dismissing the complaint, said (p. 107):

"Accepting the allegations of the bill at their full value, it results that the sole aim of the conspiracy was to halt or suppress local building operations as a means of compelling the employment of union labor, not for the purpose of affecting the sale or transit of materials in interstate commerce. *Use of the materials was purely a local matter*, and the suppression thereof the result of the pursuit of a purely local aim." (Italics ours.)

The opinion in this *Levering* case cited as authority the case of *Industrial Assn.* v. *United States*, 268 U. S. 64. That case involved a combination on the part of building contractors and others, to establish the open shop plan of employing labor, by requiring builders who desired materials of certain kinds to obtain permits from a builders exchange, and by refusing such permits to those who did not support the plan. The Court, in holding that any resultant interference with the free movement of materials from other states was incidental, indirect and remote and hence was not an unlawful interference with interstate commerce, said (p. 82):

"The alleged conspiracy and the acts here complained of, spent their intended and direct force upon a local situation—*for building is as essentially local* as mining, manufacturing or growing crops,—and if, by a resulting diminution of the commercial demand, interstate trade was curtailed either generally or in specific instances, that was a fortuitous consequence so remote and indirect as plainly to cause it to fall outside the reach of the Sherman Act." (Italics ours.)

In *Anderson* v. *Shipowners Assn.*, 272 U. S. 361, the Court, in holding that the facts showed that the alleged combination was in violation of the Sherman Act, nevertheless stated in relation to local business (p. 363):

"Nor is building commerce; and the fact that the materials to be used are shipped in from other states does not make building a part of such interstate commerce." (Italics ours.)

D

Decisions by Other Courts

There are many decisions to the same effect.

Mere local construction, original and transitory, such as was occurring within Stanley's private residence has always been judicially regarded as an intrastate activity. Otherwise, and if laying a little wall and flooring covering in several rooms in a single home can be drawn within the federal orbit, it is scarcely possible to conceive of any local business which would be exempt from the jurisdiction of the National Labor Relations Board.

The mere fact that some of the materials bought for the purpose of such a job may have been purchased from a local stock which in turn had been built up partly from a source in another state, does not confer jurisdiction on the National Labor Relations Board or other federal agency deriving its authority from the interstate commerce clause.

Murphy et al. v. *Reed et al.*, 335 U. S. 865;
McDaniel v. *Brown & Root, Inc.*, 172 F. 2d 466, 471 (C. C. A. 10);
Kelly v. *Ford, Bacon & Davis*, 162 F. 2d 555, 561 (C. C. A. 3);
Mills v. *United Ass'n of Journeymen*, 83 F. Supp. 240, 246;
Barbe v. *Cummins Construction Co.*, 49 F. Supp. 168, 171;
Scott v. *Ford, Bacon & Davis*, 55 F. Supp. 982, 984.

In addition to the above, there are many cases holding that local conduct will be insulated from the operation of the Sherman Act and other federal laws as to

interstate commerce on the basis of the purely local aims and actions.

Albrecht v. *Kinsella*, 119 F. 2d 1003, 1005;
United Leathers v. *Herkert*, 265 U. S. 457;
United Mine Workers v. *Coronado*, 259 U. S. 344;
Pedersen v. *D. L. & W. R. R. Co.*, 229 U. S. 146;
Raymond v. *Chic., Milw. & St. Paul R'way Co.*, 243 U. S. 43;
Oregon Short Line R. Co. v. *Gubler*, 9 F. 2d, 494.

Thus, in the *Raymond* case, *supra*, it was held that the plaintiff, who was injured while laboring in the construction of a new tunnel for his employer (a railroad actually operating as an interstate carrier) was not engaged in interstate commerce and that the railroad was also, as regards the construction of the tunnel, not engaged in interstate commerce.

E

The line between Interstate and Intrastate Commerce

It is inconceivable that Congress intended to attempt to wipe out the constitutional distinctions between intrastate and interstate commerce, or to extend the federal control over local activities having only a speculative, indirect, incidental or collateral effect on interstate commerce.

All intrastate commerce can theoretically have some remote consequence as regards interstate commerce. Nevertheless, the courts have been alert to hold that our constitutional system of delegated powers requires that the federal power can extend to local transactions only when their effect on interstate commerce is direct and immediate.

In *Schechter Corp.* v. *U. S.*, 295 U. S. 495, the Court said (p. 546):

> "But where the effect of intrastate transactions upon interstate commerce is merely indirect, such transactions remain within the domain of state power. If the commerce clause were construed to reach all enterprises and transactions which could be said to have an indirect effect upon interstate commerce, the federal authority would embrace practically all the activities of the people and the authority of the State over its domestic concerns would exist only by sufferance of the federal government. Indeed, on such a theory, even the development of the State's commercial facilities would be subject to federal control."

The reasoning in the *Schechter* opinion was followed by the Supreme Court in *Carter* v. *Carter Coal Co.*, 298 U. S. 238, where the Court said (p. 309):

> "The federal regulatory power ceases when interstate commercial intercourse ends; and, correlatively, the power does not attach until interstate commercial intercourse begins. There is no basis in law or reason for applying different rules to the two situations. * * * A reading of the entire opinion (in the *Schechter* case) makes clear, what we now declare, that the want of power on the part of the federal government is the same whether the wages, hours of service, and working conditions, and the bargaining about them, are related to production before interstate commerce has begun, or to sale and distribution after it has ended."

The same principle is stated in *Kidd* v. *Pearson*, 128 U. S. 1, 20, and in the qualifying language in *Labor Board* v. *Jones & Laughlin*, 301 U. S. 1, at page 37.

F

The Decision quoted by the Court Below

The only decision from which, on this issue of law, the court below quotes (R. 190-1) is *National Labor Relations Board* v. *J. L. Hudson Co.*, 135 F. 2d 380 (C. C. A. 6), certiorari denied 320 U. S. 740.

There, we submit, the facts and the situation and relationship of the parties bear no relation to the present instance. In that case, the party accused by the Board of unfair labor practice was the employer and was engaged directly and immediately in interstate commerce both as a purchaser and a seller. It was "an enormous retail department store in Detroit, Michigan" which annually purchased $35,000,000 worth of salable merchandise from points outside of Michigan and sold and shipped merchandise to the extent of about $1,400,000 to customers outside the State of Michigan. It spent about $250,000 on advertising in states other than Michigan. It had thirty-six active trademarks registered in its name in the United States Patent Office.

The complete difference between that case and the present is obvious. In the present case, the parties charged with unfair labor practice are a small local union in Chattanooga and a single individual who resides in Chattanooga and was that Local's business agent. Neither the Local nor its business agent was engaged in any interstate commerce whatever. No such claim is even made. The work being done was purely local, and consisted exclusively of a small amount of construction work in a few rooms in Stanley's private residence. The employees engaged thereon were purely transitory and were employed at will and solely for this job. This employment, set up by Stanley himself as a 100% union job, was subsequently subverted by him when he sought to transfer the installation work being done by the union men to non-union men employed

by an employer other than Parker. That purely local act of Stanley's precipitated the event.

In consequence, when, in the *Hudson* case, the Court of Appeals for the Sixth Circuit said that the Board had jurisdiction because the activities of the accused department store were "interstate commerce in such close and intimate fashion" (135 F. 2d 380, 382), it was using this language with reference to an accused which was itself a vast purchaser and seller directly through the channels of interstate commerce,— thus bearing no comparison whatever to the individual and the small local accused in the present case, engaged in no interstate commerce at all.

G

The former General Counsel's interpretation

Although in his brief below the General Counsel argued that, notwithstanding that the building activity here was local and in a private residence, nevertheless such activity may reach interstate commerce, if multiplied by frequent instances. For example, the General Counsel stated on page 23 of his brief below:

> "This is not to say that the impact on commerce resulting from respondents' activities on the Stanley job would in itself be substantial but the threatened effect on commerce is not measured solely in terms of that single project."

This argument, as applied to the facts of this case, is, we submit, (1) purely hypothetical and speculative, (2) highly dangerous and fallacious in its constitutional implications, and (3) repugnant to authoritative judicial decisions dealing with comparable facts. Moreover, there was no proof whatever of similar instances. The Stanley affair was unique, for it was he who, after setting up the job as a union job imposed non-union conditions.

There is not a particle of evidence that the Local ever did or ever would refuse to install Watson's materials by its own members. The uncontradicted and unchallenged testimony was that the union men would willingly have installed it (R. 133, 141).

There is neither claim nor evidence that the Petitioners ever picketed the Stanley residence, or threatened to do so, or solicited any of Watson's employees at that job not to work there.

Furthermore, the Examiner himself has expressly found that all picketing at Watson's store, begun before the Stanley job, was discontinued by August 28, 1947 (R. 16). There could be no clearer proof that even that lawful activity had promptly ceased to have any aspect or promise of continuance. There is not a particle of evidence that its resumption was contemplated or has ever occurred.

Also the Examiner has found that Watson's materials were all laid by August 28, and the entire job at Stanley's residence completed by August 31 (R. 20).

The momentary tempest in a teacup, stirred by Stanley's act in injecting non-union working conditions after setting up the job as a union job, had blown itself out.

The Courts have rejected reasoning so subverting of settled principles essential to our Federal system, as that sought to be applied by the General Counsel to the facts of this case.

Thus, in the *Schechter* case, 295 U. S. 495, the Supreme Court said (p. 554):

> "Activities local in their immediacy do not become interstate and national because of distant repercussions. What is near and what is distant may at times be uncertain. *Cf. Chicago Board of Trade* v. *Olsen*, 262 U. S. 1. There is no penumbra of uncertainty obscuring judgment here. To find immediacy or directness here is to find it almost everywhere. If centripetal forces are to be isolated to the exclusion

of the forces that oppose and counteract them, there will be an end to our federal system."

In *Santa Cruz Fruit Packing Co.* v. *NLRB*, 303 U. S. 453, the Supreme Court said (p. 466):

> "It is also clear that where federal control is sought to be exercised over activities which separately considered are intrastate, it must appear that there is a close and substantial relation to interstate commerce in order to justify the federal intervention for its protection."

The General Counsel has cited:

NLRB v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1;
Polish National Alliance v. *NLRB*, 322 U. S. 643;
Mandeville Island Farms, Inc. v. *American Crystal Sugar Co.*, 334 U. S. 219;
United Brotherhood v. *Sperry*, 170 F. 2d 863 (C. C. A. 10).

The *Jones & Laughlin* case, *supra*, cited by the General Counsel, upheld the constitutionality of the National Labor Relations Act by which the Congress exercised the federal power to protect the general field of interstate commerce from disruptions through industrial strife. The opinion has, in our judgment, relevancy to the present case *only* because of the following two sentences therein (301 U. S. 1, 30, 31):

> "The authority of the federal government may not be pushed to such an extreme as to destroy the distinction, which the commerce clause itself establishes, between commerce 'among the several States' and the internal concerns of a State. That distinction between what is national and what is local in the activities of

commerce is vital to the maintenance of our federal system."

"There can be no question that the commerce thus contemplated by the Act (aside from that within a Territory or the District of Columbia) is interstate and foreign commerce *in the constitutional sense.*" (Italics ours.)

The *Polish National Alliance* case, *supra* (322 U. S. 643), cited by the General Counsel, can have no conceivable application. There the Polish National Alliance, which the National Labor Relations Board had found guilty of unfair labor practices, conducted a nationwide business, playing an insurance, lending, investing and credit role "in interstate industries, railroads, and other public utilities", and conducting financial transactions across state lines in such wise as inevitably to affect "to an extent not negligible the interstate enterprises in which the large assets of Alliance are invested" (pp. 645-6).

The *Mandeville Island Farms* case, *supra* (334 U. S. 219), cited by the General Counsel, was an instance where the defendant was sued for a nationwide conspiracy in violation of the Sherman Act. The Supreme Court upheld the sufficiency of the complaint which alleged both monopoly and price fixing. The Court merely held the obvious, to wit: that the monopolization of all local business, when achieved by restraining interstate commerce, is condemned by the Sherman Act (pp. 235-6).

The *United Brotherhood* case, *supra* (170 F. 2nd 863), cited by the General Counsel, was not local at all. There, in the course of a strike against an employer shipping prefabricated houses throughout the United States, a secondary strike was instituted against a purchaser of such houses in the very act of shipment across State lines.

The General Counsel also attempts to erase, or at least blur, the distinction as applied to this case between intrastate and interstate commerce, by citing statements from the Senate Report on the Taft-Hartley Act and statements made by individuals in the debates in Congress.

We think that the foregoing statements by Senator Taft, the chief author and draftsman of the Act, are an adequate answer to this attempt.

H

The Subsequent Cleavage between the former General Counsel and the Board as to the Application of the Act to Small Local Construction

As far as we can ascertain, the present case was the first, involving local temporary construction in *a private residence*, to come before the Board. The Board accepted jurisdiction, with a reluctant concurring opinion by the Chairman and an outright dissent by member Houston (R. 60, 61).

Thereafter, in several cases, the Board refused to take jurisdiction and dismissed cases concerning *companies in the building construction industry* on the very ground that their business was primarily local and insubstantial.

These cases are:

Walter J. Mentzer, 82 N. L. R. B. No. 39;
Petredis & Fryer, 85 N. L. R. B. No. 45;
Row Construction Co., 88 N. L. R. B. No. 132;
B. W. Fellers Co., 88 N. L. R. B. No. 212.

In the *Mentzer* case (unofficially reported at 23 LRRM 1570), the facts show that the respondent was a plasterer contractor who purchased material from outside the state. The General Counsel argued that the facts in this case established the importance of the small establishment in

the construction industry, and required that this type of business be brought under the Act.

The Board, however, stated that in numerous cases involving aspects of the building construction industry, they have refrained from accepting jurisdiction. In refusing to accept jurisdiction in that case, the Board stated:

> "Accepting the General Counsel's offer as proved, we nevertheless find that the operations of Respondent Mentzer, a small contractor, *are essentially local in character,* and that their interruption by a labor dispute could, at most, have only very remote and insubstantial effect on commerce. Nor does Mentzer's status as a building contractor dictate a different conclusion." (Italics ours.)

In concurring, Chairman Herzog stated:

> "This building construction operation is both local and insubstantial. Although its local attributes seem to me no more conspicuous than those present in the *Watson* case, where we exercised jurisdiction, a different result is permissible and warranted here because the section of the Act involved has a different legislative history."

In the *Petredis & Fryer* case (unofficially reported at 23 LRRM 1395), the Board declined to take jurisdiction even though there was a secondary boycott and a general local contractor who was engaged in the construction of a theatre was the charging party. The Board stated:

> "On the basic jurisdictional facts * * * this case involves at the very most an impact on commerce no greater and no less remote than that present in the recent Mentzer case (*Matter of Walter J. Mentzer,* 82 NLRB #39), in which a majority of the Board declined to accept jurisdiction."

In *Row Construction Company* (unofficially reported at 25 LRRM 1362), the Board held that the intention of the National Labor Relations Act would not be effectuated by asserting jurisdiction over a complaint where the employer's operations were limited to the construction of small municipal buildings. The Board, in rejecting the arguments of the General Counsel that jurisdiction should be asserted, stated:

> "The General Counsel in fact concedes that the business of Row, standing alone, is so small that the Board, should it follow certain precedents, would not exercise jurisdiction herein. (See *Petredis & Fryer*, 85 NLRB No. 45, [24 LRRM 2395], and cases cited therein). But, according to the General Counsel, there are reasons why jurisdiction should be asserted here. First, that the general contracting industry is a multi-million dollar industry, conducted primarily by small units which constitute, in the aggregate, a vast volume of interstate commerce; that nearly 50 percent of all general contracting within Southern California is performed by contractors with 3 or less employees; and that the fact that Row's 'own contribution to the demand for construction products may be small in volume is not enough to remove him from the scope of Federal regulation * * *' A similar argument was advanced before the Board in the *Mentzer* case, and disposed of adversely to the General Counsel. (*Walter J. Mentzer*, 82 NLRB 389 [23 LRRM 1570]). Second, that if jurisdiction exists in this proceeding, the Board must exercise it, that discretion does not lie within the Board to dismiss a complaint solely because it believes that to assert jurisdiction would not effectuate the policies of the Act, and that the question whether jurisdiction should be asserted in any case is for determination exclusively by the General Counsel. This proposition too has been considered by the Board, and decided adversely to the General Counsel. (*Haleston Drug Stores, Inc.*, 86 NLRB No. 125 [25 LRRM 1040]).

In *B. W. Fellers, Inc.* (unofficially reported at 25 LRRM 1473), the Board declined to assert jurisdiction in a complaint proceeding where the employer was a local general contractor engaged primarily in residential construction. This ruling was based by the Board on the *Petredis & Fryer* and *Mentzer* cases noted above.

These decisions by the Board, rendered after its decision in the present case, show that:

1. The Board has become alive to the fact that, if the Taft-Hartley Act is extended to local temporary construction in a private residence or a like building, there is no limit to the extension of that Act over the entire economy and business of the nation.

2. In this, the initial, case before it involving small, local, temporary construction in a single building, the Board had at first adopted, but has now abandoned, the view stated herein by the Chairman that: "The General Counsel having seen fit to prosecute this case, I believe that the Board is under a duty to complete the task by asserting jurisdiction" (R. 62).

Obviously, as the above later cases show, the Board has now determined that there is no such "duty" to follow the General Counsel in his almost unlimited interpretation of the application of the Taft-Hartley Act, and has further determined that the meaning and policy of that Act is far more restricted in the field of purely local construction, even where such construction is not for a private owner but for a company or contractor engaged in the construction business.

As is well known, this cleavage in interpretation, which has come into the open between the General Counsel and the Board, has been considered and made the subject of authoritative pronouncements by Committees of Congress.

I

Pronouncements by Committees of Congress against the former General Counsel's interpretation of the Taft-Hartley Act

In early 1948 joint sub-committees of the House Committee on Expenditures in the Executive Departments and of the House Committee on Education and Labor were created to investigate the scope of the disquieting interpretation by the General Counsel of the NLRB of the term "affecting commerce" as used in the Taft-Hartley Act. These sub-committees made a unanimous Report on May 26, 1948 (80 Congress, 2nd Session, House Report No. 2050) which was thereupon approved and adopted by the full Committee on Expenditures without a dissenting vote. This Report disclosed that the General Counsel, Mr. Denham, had officially stated that (pp. 5, 6):

> "The present thought of the Board * * * is that it is a rare case in which business does not affect commerce in some degree and that where commerce is affected the Board has jurisdiction. * * * I can conceive of very few businesses over which there is not at least technical jurisdiction."

The sub-committee noted that, since the jurisdiction section of the Taft-Hartley Act had been taken verbatim from the Wagner Act, Congress did not intend to enlarge the scope of jurisdiction under the new Act. In its findings the sub-committee stated (p. 5 of House Report 2050):

> "Your subcommittee is certain that it was not the intention of Congress to include in the jurisdiction of the National Labor Relations Board every small, local business which drew a small portion of its supplies or merchandise from beyond the borders of a State or Territory. * * *

"The subcommittee is of the opinion that this new interpretation proposed by the general counsel of the Board to be placed upon the term 'affecting commerce' is not warranted either by the previous history of interpretation and administration of the Wagner Act, by the debates on the bill or by the terms of the Act itself; that such interpretation is not necessary to effectuate the purposes of the act.

"The subcommittee looks upon this proposed interpretation as an attempt, by administrative interpretation, to give the country administrative law in the place and stead of law enacted by the Congress. * * * Our national history does not afford a more striking example of bureaucratic aggrandizement."

This Report was thereupon approved by the whole Committee on Expenditures, without dissenting vote, and forwarded to the Speaker.

POINT VII

In any event, on August 22, 1947, and thereafter, there was, as a matter of law, (1) no justification for "A Cease and Desist Order"; and (2) no justification for not applying the *de minimis* principle.

(1) The testimony is all unanimous, and the Examiner and the Board so found, that the entire work at Stanley's residence (including the installation of Watson's materials) was completed within a few days, to-wit by August 28 (R. 20, 56).

The Examiner and the Board held that the picketing of Watson's store, discontinued by August 28, 1947, was not an unfair labor practice (R. 16, 25, 59).

Watson's filed no charge until August 29. Its amended charge was filed September 15 (R. 173).

The Examiner expressly found, and the Board confirmed the finding (R. 27, 50, 59), that:

> "There was no attempt (by the Petitioners) to prevent Watson's employees from working on this or any other job. There was no picketing or any of the usual methods used to persuade employees not to work—simply a concerted refusal to continue working with the non-union workers, in accordance with long established union precedent." (Parenthesis supplied.)

The Examiner also expressly found, and the Board confirmed the finding (R. 21, footnote 20; 51, 59):

> "Henderson's testimony is also credited that in his capacity as business agent for the Union he was not asked at any time after August 21 by either Stanley or Parker to order the union carpenters to return to the Stanley job."

There was no proof, evidence or claim of any overt or affirmative action of any kind against Stanley's job or Watson's men employed there after August 21, 1947. There never was any picketing of the Stanley job. There is no claim that there was even a threat to picket it.

Hence, there was no more justification for the issuance of an administrative injunction order by the Board than, as Judge Darr held, there was for the issuance of an injunction order by the Court.

(2) Injunction orders, whether or not couched in terms of "cease and desist", cannot lawfully be issued merely as exhortation, or as advice, or on suspicion, or as a punishment, or where, as Judge Darr ruled, the case is "moot" (74 F. Supp. 499, 502).

Thus, in *Walling, Administrator of Wage and Hour Division* v. *Livrenois*, 50 F. Supp. 978, the Court said (p. 980):

"We do not believe in government by injunction to begin with nor do we believe that there is evidence of prospective further violation if this defendant returns to the business of manufacturing bricks. Where such a probability does not exist there is no need of an injunction. *Fleming* v. *Phipps*, D.C., 35 F. Supp. 627; *Fleming* v. *National Bank of Commerce of Charleston*, D.C., 41 F. Supp. 833; *Walling* v. *Woodruff*, D.C., 49 F. Supp. 52; *Walling* v. *Builders' Veneer & Woodwork Co.*, D.C., 45 F. Supp. 808."

In *Walling* v. *Nashville, Chattanooga & St. Louis Ry.*, 60 F. Supp. 1004, the Court said (p. 1008):

"So even if they are 'employees', which the court holds that they are not, there is no necessity for an injunction, the purpose of an injunction being to prevent future violations, not to punish past violations."

This decision was affirmed by the Supreme Court of the United States in 330 U. S. 158.

To the same effect is *Walling Administrator of Wage and Hour Division* v. *Todd*, 52 F. Supp. 62, 65.

(3) Moreover, the Chairman of the Board has referred to this controversy as one *"so local and so diminutive"* (R. 62); and such was the ground of the dissent in the Board (R. 63).

It is a very familiar principle that the law "is not concerned with trifles", and that restraining orders will not be issued against them. *De minimis lex non curat.*

Reuter v. *Walling*, 137 F. (2d) 315, 319 (C. C. A. 5);

Virginia Electric & Power Co. v. *National Labor Relations Board*, 115 F. (2d) 414, 422-3 (C. C. A. 4); reversed on other grounds 314 U. S. 469.

In *Groneman* v. *International Brotherhood of Electrical Workers*, 177 F. 2d 995 (C. C. A. 10), decided November 4, 1949, the charge was a secondary boycott and illegal picketing by the defendants. Certain union carpenters had left a construction job *for nine days*, thereby delaying the completion of the job for that brief period. Although the charge was that the objective of the strike was a secondary boycott, the suit for damages under Section 303 (b) of the Labor-Management Act of 1947 was dismissed for the reason that the effect of such brief construction delay upon interstate commerce was so slight as to fall within "the *de minimis* doctrine."

CONCLUSION

The decree of the United States Court of Appeals should be reversed, and the petition for enforcement should be dismissed.

Dated, February 2, 1951.

Respectfully submitted,

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